NO. 22309

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GENE LEWIS MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in two counts of a three-count indictment, following trial by jury [C.T. 91].[1/]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231, and Title 21, United States Code, Section 174.

1/ "C.T." refers to the Clerk's Transcript.

Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in all three counts of a three-count indictment returned by the Federal Grand Jury for the Southern District of California, Southern Division. The first count alleged that appellant knowingly imported and brought approximately one ounce of heroin into the United States from Mexico contrary to Title 21, United States Code, Section 174 [C.T. 2].

The second count alleged that appellant entered the United States from Mexico, after having been convicted of Illegal Importation of Narcotics, carrying a penalty of more than one year, without registering with a Customs Official as required in Title 18, United States Code, Section 1407 [C.T. 3].

The third count alleged that appellant did forcibly resist, oppose, impede and interfere with Samuel T. May, a person authorized to make searches and seizures, while May was engaged in the performance of his official duties [C.T. 4].

Jury trial of appellant commenced on June 26, 1967 before United States District Judge James M. Carter. Appellant was found guilty by the jury as charged on Counts One and Two on June 28, 1967 and not guilty as to Count Three [C.T. 44].

Thereafter, on July 5, 1967, appellant was committed to the custody of the Attorney General for ten years upon Count One [C.T. 91]. An information

was filed alleging a prior conviction of Title 21, United States Code, Section 174, which was admitted by appellant [C.T. 91, 92], which served to make ten years the minimum sentence.

Appellant subsequently filed a notice of appeal [C.T. 98].

III

ERROR SPECIFIED

The points specified by appellant on appeal are paraphrased as follows:

1. The possession Instruction should not have been given.
2. The jury was erroneously instructed that a witness is presumed to speak the truth.
3. Government Counsel committed error by repeated reference to appellant's prior felony conviction.
4. The indictment was faulty.

IV

STATEMENT OF THE FACTS

Appellant was released from the Federal Prison, Atlanta, Georgia on January 23, 1967 after serving most of a 5-year sentence for smuggling heroin from Tijuana, B. C., Mexico into San Ysidro, California [R.T. 141-143].[2/]

On January 26, 1967, just three days later, appellant was arrested

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2/ "R.T." refers to Reporter's Transcript.

after escaping from officers who desired to take him into the building where the heroin was found resulting in his prior conviction [R.T. 141-146].

Appellant started running when he was told to go into the office by Samuel T. May, Customs Inspector [R.T. 44-45]. Appellant did not register with Mr. May [R.T. 51].

A short time later appellant was found under an automobile with Exhibit One containing heroin right where his head and hand were under the automobile [R.T. 70-71]. The automobile was very low. Appellant was lying face down, facing the rear wheels. He was squeezed under the vehicle [R.T. 70, 82, 90]. Exhibit One was pushed behind one of the wheels [R.T. 90].

Several officers assisted in the search [R.T. 45].

Appellant admittted to being a user of narcotics before going to prison [R.T. 111]. He admitted he knew he wasn't supposed to go to Mexico [R.T. 120]. Appellant further admitted going to Tijuana, B. C., Mexico, returning to San Ysidro, California and running from the officer when asked to go into the office and hiding under the car [R.T. 125, 127-129, 131, 134].

Appellant admitted he didn't register with Customs Officials upon leaving or re-entering the United States [R.T. 140-141].

Appellant admits his prior conviction was for smuggling heroin through the same port of entry, and through the same pedestrian lane. [R.T. 143].

Appellant had $90 and a bus ticket to San Diego when he left Atlanta and the probation officer gave him $365.00 more [R.T. 147-148].

V

ARGUMENT

I. THE "POSSESSION" INSTRUCTION WAS APPROPRIATELY GIVEN.

The jury must have found actual or constructive possession of Exhibit One, consisting of approximately 3/4-ounce of heroin.

Such possession, actual or constructive, may be proven by circumstantial evidence.

Hernandez v. United States, 300 F.2d 114 (9th Cir. 1962).

Viewing the evidence most favorable to the Government, the jury could well have found appellant had the heroin in his hand, and thus find actual possession.

It is undisputed that appellant fled the port of entry and hid under an automobile. The car was very low and appellant was "squeezed" under the car with his head and hands pointing to the rear [R.T. 70, 82, 90].

After he was removed from the hiding place, the heroin was behind the edge of the tire just about where his hands were [R.T. 90].

Appellant denied knowing the heroin was there. This was one of the three limited purposes of admitting proof of the prior conviction, that is to show intent and knowledge.

Appellant seems to contend that since he didn't rely on the defense "that he didn't know it was heroin and he did not know the heroin was imported

contrary to law", the instruction was inappropriate.

The Supreme Court holds the inference applicable to cases where the defendant denies any connection with the drug.

Harris v. United States, 359 U.S. 19 (1959).

Possession, actual or constructive, once proved, substitutes for proof the heroin was imported contrary to law and appellant's knowledge of such illegal importation.

Hernandez v. United States, supra.

The only case cited by appellant, Davis v. United States, 382 F.2d 221 (9th Cir. 1967), on this point is easily distinguished. In that case, the heroin was not found until the next day and the vehicle "had repeatedly been left unlocked and unattended".

Appellant quarrels with Judge Carter's definition of possession. This Court recently approved a similar explanation by Judge Carter. Judge Carter made it clear the jury must find a knowing possession [R.T. 252].

Moody v. United States, 376 F.2d 525 (9th Cir. 1967).

Proof of possession tends to show knowledge.

Eason v. United States, 281 F.2d 818, 820 (9th Cir. 1960);

Evans v. United States, 257 F.2d 128 (9th Cir. 1959);

Arellanes v. United States, 353 F.2d 270 (9th Cir. 1965).

II. AN INSTRUCTION THAT A WITNESS IS PRESUMED TO SPEAK THE TRUTH DOES NOT REQUIRE REVERSAL IN THIS CASE.

Judge Carter followed the statement, "a witness is presumed to speak the truth" with a lengthy explanation of the manner in which credibility is judged [R.T. 240-243].

Admittedly no objection was made to this instruction [A.B. 19].[3/] No objection was found in the record. Appellant testified.

The cases relied on by appellant appear distinguishable. An excellent discussion involving most of the cases relied on by appellant is found in United States v. Billoti, 380 F.2d 649, 655 (2nd Cir. 1967).

As contrasted with this case, no explanation of the charge was made in United States v. Persico, 349 F.2d 6, 10-12 (2nd Cir. 1965) and apparently no such explanation was made in United States v. Johnson, 371 F.2d 800, 804-805 (3rd Cir. 1967).

Billoti, supra, at 656, concludes that where an explanation is given, reversible error does not result.

It is further noted that appellant did testify. In Johnson, supra; Billoti, supra; and Meich v. United States, 370 F.2d 768, 773-774 (3rd Cir. 1966) the defendant did not testify.

3/ "A.B." refers to Appellant's Brief.

It has been held, where no objection was made, plain error does not esult.

Roviaro v. United States, 379 F.2d 911, 915 (2nd Cir. 1967).

The reason for such a rule is more obvious in this case. Appellant probably desired and benefited by such an instruction.

At any rate, "isolated instances of possible prejudice will not form he basis for reversible error."

United States v. Salley, 360 F.2d 699, 703 (4th Cir. 1966);

Todorow v. United States, 173 F.2d 439, 448 (9th Cir. 1949).

In summary, in order to constitute reversible error, the defendant must not testify, there must be no explanation of the presumption, and an objection must be made.

III. REFERENCES TO APPELLANT'S PRIOR FELONY CONVICTION WAS PROPER.

The prior felony conviction was admitted for three separate and distinct purposes, as follows:

1. Impeachment of appellant after he testified [R.T. 243].

2. As to the issue of intent and knowledge (prior similar Act) [R.T. 245].

3. As to Count Three, failure to register as a prior convicted offender (Title 18 U.S.C. 1407) [R.T. 244].

In discussing the prior conviction, it was carefully limited to these areas in argument by counsel for the appellee.

In addition, failure to register was used as an alibi for appellant.

Appellant's counsel, Mr. Steward, mentioned the conviction in his opening statement, and then proceeds to mention it 9 times in only 6 pages of argument while presumably trying to avoid the issue.

The total argument for the Government was 26 pages in which appellant claims the conviction was mentioned 18 times.

In deciding against a similar contention, Judge Learned Hand said,

> "To shear him (the prosecutor) of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice . . . . "

Dicarlo v. United States, 6 F.2d 364, 368 (2nd Cir. 1925).

In this case, no objection was made until all argument was finished.

The Supreme Court says, "It is the duty of the defendant's counsel at once to call the attention of the Court to the objectionable remarks, and request its interposition . . . ."

Crumpton v. United States, 138 U.S. 361, 364 (1891).

Otherwise objectionable argument becomes proper when put in issue as in this case. See Rice v. United States, 35 F.2d 689, 695 (2nd Cir. 1928)

Crumpton v. United States, supra;

Malone v. United States, 94 F.2d 281, 288 (7th Cir. 1938);

Ochoa v. United States, 167 F.2d 341, 344 (9th Cir. 1948).

Assuming that some of the argument was outside the bounds of propriety, this alone doesn't necessarily necessitate a reversal.

United States v. Socony-Vacuum Oil Co., 150 U.S. 239 (1940).

Only a weak case, where prejudice to the accused is so highly probable constitutes reversible error.

Berger v. United States, 295 U. S. 78 (1935).

The record, in this case, reflects overwhelming evidence against appellant.

The error, if any, was cured by the charge to the jury.

IV. COUNT ONE OF THE INDICTMENT WAS SUFFICIENT.

Appellant contends that Count One does not state an offense since it does not allege knowingly and fraudulently. The indictment alleges knowingly only.

The Statute (21 U. S. C. 174) uses the term knowingly or fraudulently. It would appear that the charge may be either depending on the facts. It is noted the indictment incorporates the language of 21 U. S. C. 173 by reference as follows:

"Contrary to Title 21, United States Code, Section 173."

That section provides,

"It is unlawful to import or bring any narcotic drug into the United States . . . .; except . . . . None of the exceptions include heroin."

Appellant claims no prejudice, but prefers, apparently, to rely on what he claims to be a technical defect and further claims the common law applies.

Rule 7(c) Federal Rules of Criminal Procedure has eliminated both the technical niceties and the common law application to indictments.

The still leading case on questions involving sufficiency of the indictment is Hagner v. United States, 285 U. S. 427 (1931).

In that case, the Court at 431 made an often repeated statement:

"The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects not prejudicial, will be disregarded."

The Hagner case put considerable weight to statute of similar wording to Section 7(c) of the Federal Rules of Criminal Procedure which requires prejudice.

The Court said, at 433,

"Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form or by fair construction can be found within the terms of the indictment."

Similar reasoning is found in the following cases:

Stein v. United States, 313 F.2d 518, 520 (9th Cir. 1962);

Heaton v. United States, 353 F.2d 288, 292 (9th Cir. 1965);

Medrano v. United States, 285 F.2d 23, 26 (9th Cir. 1960), cert. denied, 366 U. S. 968;

Shafer v. United States, 179 F.2d 929, 930 (9th Cir. 1950).

As in this case, provisions of the statute may be included by reference.

Palomino v. United States, 318 F.2d 613, 615-616 (9th Cir. 1963);

Stein v. United States, supra, at 520.

Stein involved a similar reference to 21 U. S. C. 173. The Court there placed emphasis on the provision in 173 that heroin may not be imported legally.

It is contended, therefore, since heroin is involved, the indictment need only allege knowingly.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT